5 *Official Opinions of the Compliance Board* 189 (2007)

PUBLIC BODY – PANEL OF CRITICAL AREA COMMISSION, HELD TO BE A PUBLIC BODY – CLOSED SESSION PROCEDURES – FAILURE TO TAKE RECORDED VOTE, HELD TO BE A VIOLATION – MINUTES – PANEL REPORT INSUFFICIENT

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Craig O'Donnell
Kent County News

The Open Meetings Compliance Board has considered your complaint that a Critical Area Commission panel violated the Open Meetings Act in connection with a meeting held on July 30, 2007. You alleged that the panel closed the meeting without complying with the procedural requirements of the Act and that the "panel report" generally failed to qualify as minutes under the Act and, more specifically, failed to disclose information required to be in made available to the public after a closed session.

For the reasons explained below, we find that a panel of the Critical Area Commission, formed pursuant to statutory mandate, is a "public body" for purposes of the Open Meetings Act. To the extent that the panel failed to comply with procedural requirements of the Act in closing its meeting July 30 and failed to satisfy the Act's requirements concerning minutes, it violated the Act.

I

Complaint, Response, and Supplemental Record

In your initial complaint, dated July 30, 2007, you indicated that a panel of the Critical Areas Commission met on that same morning concerning a matter called the Drayton Manor Growth Allocation. Shortly after noon, Gary Setzer, the chair of the panel, informed the audience that he was closing the meeting to obtain legal advice, a permissible basis for a closed session under §10-508(a)(7).[1] According to the complaint, "[t]hat was the entire 'procedure' he followed." Furthermore, the complaint stated that, following the meeting, you asked the Assistant Attorney General representing the panel for a copy of the written statement and were told she

[1] Unless noted otherwise, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

did not have it. The complaint went on to list perceived violations in connection with the closed meeting. The complaint further questioned whether minutes were produced.

On August 6, you filed a supplement to the complaint, indicating that you inquired about minutes from the meeting. According to the complaint, a staff member indicated that minutes are not prepared for panel meetings. Instead, a "panel report" is prepared, summarizing discussions during the panel proceeding. A copy of the 12-page panel report, dated August 1, 2007, was appended to the supplemental complaint. The complaint noted that there was no mention of the closed session in that document and alleged that the document failed to satisfy the requirement for minutes under the Act. We informed the Commission that we would treat the allegations in both documents as a single complaint.

In a timely response on behalf of the panel, Marianne Dise, Assistant Attorney General and Principal Counsel for the Critical Area Commission, argued that, unlike the Commission, a panel does not meet the definition of a public body under §10-502(h). The response acknowledged that, pursuant to §8-1809(d) of the Natural Resources Article ("NR"), Annotated Code of Maryland, the Commission appoints a panel to conduct a public hearing on a proposal by a local jurisdiction to amend its local critical area program. While the panel conducts the hearing, that is its only role; it has no decision-making responsibilities. "All decisions ... are made by the full Commission." The response further noted that, while a panel is not subject to the Open Meetings Act, the Commission "recognizes that public trust in government is vitally important, and thus, by custom, the Commission members who serve on panels have met at times and in places that are available to the public. By custom, the public is welcome to attend, with the same restrictions applicable to meetings which are subject to the Open Meetings Act." Citing decisions of the Court of Special Appeals, the response disputed the complaint's suggestion that amendments to a local jurisdiction's critical area program involve a zoning matter. As to the availability of minutes, the response noted that minutes are available for Commission meetings; however, for panel sessions, a memorandum or report is maintained at the Commission's office.

After receiving the response, and before our consideration of this matter, we invited counsel to the Critical Area Commission to address the specific allegations in the complaint, so that we would have the benefit of the Commission's response were we to conclude, contrary to the Commission's initial argument, that the Act applied to the panel. In a prompt response, Ms. Dise acknowledged some of the factual assertions in the complaint, but she disputed that you asked Assistant Attorney General Saundra Canedo for a copy of the written statement prepared in closing the meeting. Rather, according to the response, you indicated that you "*could* ask to see it." The supplemental response also noted that "although no motion was made to close the meeting [on July 30], and there was no vote taken, all members of

the panel assented to the closure. Mr. Setzer did read a statement but did not sign it." As to allegations concerning minutes, the supplemental response noted that the panel report is intended as a summary report for use of the panel to assist it in making a well-founded recommendation to the Commission; the document is not intended to function as minutes. The supplemental report reiterated that "it is the Commission's understanding and practice that panels of the Commission are not 'public bodies' subject to the Open Meetings Act."

II

Applicability of the Act

The Open Meetings Act applies only to meetings of public bodies. If an entity is not a public body as defined under the Act, neither the substantive nor procedural requirements of the Act apply. The Act provides two distinct mechanisms under which a multi-member entity might qualify as a "public body." *City of Baltimore Dev. Corp. v. Carmel Reality Assoc.*, 395 Md. 299, 323, 910 A.2d 406 (2006).

One mechanism, set out in §10-502(h)(2), entails the appointment of an entity's members (including at least two non-governmental members) by the Governor or chief executive authority of a political subdivision or by an official subject to the Governor's or chief executive's policy direction. In this case, while the Commission itself includes public members appointed by the Governor, NR §8-1804, members of a panel established to consider an amendment to a local program are appointed by the Commission from among its membership. NR §§8-1802(a)(15)(ii) and 8-1809(d)(1). Even if a panel includes two public members of the Commission, it is their membership on the Commission that results in their designation for panel service, not appointment by the Governor to the panel. Thus, we agree with the Commission that a panel does not qualify as a public body under §10-502(h)(2).

However, in our view, a panel established to conduct the hearing and make recommendations to the Commission qualifies as a public body under §10-502(h)(1), which defines the term "public body" as an entity that, among other possibilities, "is created by ... a State statute." After a local jurisdiction presents a certain critical area protection program, "the Commission *shall appoint* a panel of 5 of its members to conduct, in the affected jurisdiction, a public hearing on the proposed program." NR §8-1809(d)(1). Having mandated that a panel exist under these circumstances, the General Assembly went on to legislate certain details about panel operations. The statute specifies the number of panel members required to constitute a quorum, prohibits the panel from holding a hearing without a quorum, and prohibits the panel from taking any official action unless a quorum is present and a majority of those present concur. NR §8-1804(e)(2), (3), and (4).

That a panel itself has no decision-making authority does not affect our conclusion. An analogous situation arose in *Carroll County Educ. Ass'n v. Bd. of Educ. of Carroll County*, 294 Md. 144, 155, 448 A.2d 345 (1982), which concerned representatives of a local board of education participating in collective bargaining negotiations on behalf of the local board. The Court of Appeals held that this group constituted a "public body" under former Article 76A, §8(g) – now §10-502(h)(1). Like the panel, the representatives of the local board of education lacked final decision-making authority; nevertheless, they were assigned a role in the process pursuant to a State statute and so were deemed a public body separate and apart from the local board itself.

In summary, we find that a panel appointed to conduct a hearing pursuant to the Critical Area statute is a public body for purposes of the Open Meetings Act.[2]

III

Procedures to Close a Meeting; Minutes

Given the Commission's premise that a panel was not a public body under the Act, which we hold to be incorrect, it is unsurprising that the panel did not comply with at least two of the Act's requirements, as alleged in the complaint.[3]

Under §10-508(d)(1), a "recorded vote" was needed to close the July 30 session. A properly documented voice vote suffices, 3 *OMCB Opinions* 197, 200 (2002), but passive assent is insufficient. The panel's failure to take a recorded vote violated the Act.

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[2] The complaint and response joust a bit over whether the panel's actions involved a zoning matter under §10-503(b)(2). We note that the Court of Appeals has given the Act's reference to zoning matters an expansive interpretation. *Wesley Chapel Bluemount Ass'n v. Baltimore County*, 347 Md. 125, 699 A.2d 434 (1997); *see also Friends of the Ridge v. Baltimore Gas and Elec. Co.*, 352 Md. 645, 649 n. 4, 724 A.2d 34 (1999). Assuming, purely for the sake of discussion, that the panel's hearing involved a zoning matter, the result would be that it could not be considered outside the scope of the Act as an administrative or quasi-judicial function under §10-503. It certainly would not mean that a session could not be closed pursuant to one of the exceptions in §10-508(a), as suggested in the supplemental complaint. Nevertheless, whether the panel's session involved a zoning matter is not an issue we need to reach, because the response never suggested that the panel's session involved a function outside the scope of the Act.

[3] In addition, the complaint commented that the failure to post minutes on the Commission's website is "very poor public policy." Whatever the merits of this policy contention, it does not raise an Open Meetings Act issue. The Act does not require a public body to make its minutes available on a website.

Another aspect of the procedures for closing a session involves preparation of a written statement containing the elements set out in §10-508(d)(2)(ii), namely "the reason for closing the meeting, [the] citation of authority under this section, and a listing of the topics to be discussed." Apparently, a written statement was prepared. Whether it contained all of the elements specified in §10-508(d)(2)(ii) we cannot say, because a copy of the statement was not provided to us. On this point, therefore, we express no opinion. *See* §10-502.5(f)(2) ("An opinion of the [Compliance] Board may state that the Board is unable to resolve a complaint.").[4]

The response acknowledged that the panel report was not intended to function as minutes. Despite its having a different objective, the document's comprehensiveness may well have satisfied the Act's requirements for minutes of a public meeting. *See* 10-509(c)(1). However, it is clear that the document failed to contain all of the elements required to be disclosed about a closed meeting. §10-509(c)(2).

IV

Conclusion

In summary, we find that a panel of the Critical Area Commission, appointed pursuant to statutory authority, is a "public body" for purposes of the Open Meetings Act. To the extent that the panel failed to comply with procedural requirements of the Act in closing its meeting on July 30 and failed to satisfy the Act's requirements concerning minutes, it violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

Courtney J. McKeldin
Tyler G. Webb

[4] Because the complaint and response provided conflicting information as to whether a copy of the written statement was actually requested on July 30, we decline to address whether a violation of §10-508(d)(4) may have occurred. *See* 1 *OMCB Opinions* 56, 58 (1994) (Compliance Board not set up to resolve disputed issues of fact.)